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Twenty-eighth session

SUMMARY RECORD (PARTIAL)* OF THE 575th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 22 May 1995, at 9.30 a.m.

Chairman: Mr. GOH (Singapore)

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* No summary record was prepared for the first part of the meeting.

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The discussion covered in the summary record began at 9.50 a.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (*continued*) (A/CN.9/396 and Add.1, A/CN.9/410)

1. **The CHAIRMAN** invited the Commission to resume its consideration of the draft Notes on Organizing Arbitral Proceedings (A/CN.9/410, annex).

Section 6

2. **Mr. HOLTZMANN** (United States of America) said that his delegation welcomed the addition in the current draft Notes of a section on confidentiality. It was a subject that was receiving increasing attention among arbitration institutions and in court rulings, and was expected to undergo changes and developments over the coming years, particularly in the areas covered by paragraphs 29 to 31. He accordingly felt that those paragraphs should be reworded to state that parties might wish in appropriate cases to consider entering into agreements relating to confidentiality. He proposed that the revised text should indicate that such agreements might include one or more of the following aspects: identifying what material should be kept confidential; establishing measures to maintain confidentiality of that material and of hearings; clarifying whether the existence of the arbitration or the award should be kept confidential; determining whether any special procedures should be employed to maintain confidentiality of information transmitted by electronic means; and specifying the circumstances in which confidential material might be disclosed, such as cases where such disclosure was required by law or where information came within the public domain. In the Secretariat's redrafting of the text, it would be preferable to avoid recommending that all those aspects be included; the choice should be left to the discretion of the parties and arbitrators.

3. **Mr. FOUCHARD** (France) said that he agreed in part with the analysis given by the representative of the United States of America, but not at all with the conclusions he drew from it. Although confidentiality was a new and changing area of attention, he did not feel that the Notes should recommend that an agreement be concluded on the subject. That would be difficult to negotiate and would also encumber the procedure and increase the cost. Paragraph 28 should merely state that, since confidentiality was one of the essential advantages of arbitration, the arbitral tribunal had a duty to recall the principle of confidentiality, seek to ensure that it was respected and draw the parties' attention to their obligations in the matter. In his view, paragraphs 29 to 31 were too technical and should be deleted.

4. **Ms. ZHANG Yuejiao** (China) agreed that some redrafting of the text was necessary. Confidentiality had considerable applications and implications. In her view, paragraphs 29 to 31 could be simplified. The Notes could state that confidentiality was an important factor in the transmittal of information by electronic means and by means of documents, and that parties should take particular care in their use. In cases where arbitration institutions did not have their own rules, the question of confidentiality should be based on agreements made between the parties, failing which the arbitral tribunal would be able to make its own arrangements.

5. **Mr. GRIFFITH** (Australia) said that his delegation considered it important for the Notes to make it clear that parties should not assume that obligations of confidentiality existed. He would suggest that the text might mention that the arbitral tribunal could inquire as to what undertakings it should give the parties and what undertakings the parties might wish to give each other with regard to confidentiality. It would be preferable for the arbitral tribunal and the parties to clarify the matter at the preliminary stage of the arbitration by an agreement in principle rather than deal with a particular issue of confidentiality if it arose in the course of the proceedings.

6. **Mr. BURMAN** (United States of America) felt that paragraph 29, as currently worded, might inadvertently give the impression that communications by electronic means were suspect and could be unsafe. On the contrary, if properly used, computer-based transmissions were much safer than traditional methods of communication. The actual inclusion of such a topic in the Notes was open to question, since it was geared not to the issue of confidentiality, but to particular methods of communication. It would be better to delete the paragraph. If, however, it was retained, it should avoid making any implication about the safety of communication. His comments would also apply to paragraph 33.

7. **Mr. OLIVENCIA** (Spain) said that his delegation felt that paragraph 28, which merely stated that it might be useful for the arbitral tribunal to record parties' agreements on confidentiality, was possibly insufficient in that the role of the arbitral tribunal was not necessarily one of a passive recorder of an agreement of the parties. Arbitrations were not public, but private proceedings, a fact that offered certain advantages. There would be no problem if parties reached agreements on confidentiality and the arbitral tribunal recorded them, with the parties assuming responsibility for them. It might, however, prove difficult for the arbitral tribunal to take decisions at the outset on confidentiality of the arbitration, although it could draw attention to the principle of confidentiality and its scope.

8. It was also important to point out in the Notes that the arbitral tribunal itself had a duty of confidentiality in its conduct of the proceedings. In cases that attracted public interest, arbitrators were often approached by the media seeking details of the course of the proceedings. Moreover, agreements reached by the parties before the appointment of the arbitrators were also binding on the arbitrators. In his view, the text should be redrafted in order to deal with those additional aspects.

9. **Mr. ABASCAL ZAMORA** (Mexico) said that his delegation was of the opinion that paragraph 29 was appropriately drafted. The only two electronic means of communication it referred to, telefax and electronic mail, did not at present provide parties with much security in the matter of confidentiality and could easily be intercepted by third parties.

10. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that arbitration differed from the standard judicial process in that the parties played an important role in arbitral proceedings and in deciding on the manner in which they were conducted. Confidentiality was thus essential: the parties had vital interests and did not wish to disclose the nature of those interests. His delegation accordingly felt that it would be useful if the paragraphs on confidentiality mentioned agreements between the parties and the importance of adopting measures to ensure confidentiality. Those points were in addition to the role of the arbitral tribunal.

11. **Mr. SZURSKI** (Poland) said that confidentiality was one of the most attractive advantages of arbitration, and that his delegation therefore welcomed the inclusion of a reference to it in the Notes. In its view, paragraphs 28 to 31 were not at variance with current arbitration practice world-wide; they should accordingly remain as they stood, or possibly incorporate the changes proposed by the representative of France.

12. **Mr. SIKIRIC** (Observer for Croatia) agreed with the representative of Spain that the Notes should mention that principles agreed upon by the parties regarding confidentiality should also be binding on the arbitrators, since they enjoyed the parties' trust.

Section 7

13. **Mr. SZURSKI** (Poland), referring to the second sentence of paragraph 32, said that it was rare for the parties, when corresponding with each another, to send copies to the arbitrators. The last seven words of that sentence should therefore be deleted. Since the arbitrators were responsible for directing the proceedings, correspondence in principle took place between them and the parties.

14. The Notes might usefully refer to a problem sometimes encountered in connection with the exchange of writings, in both administered and ad hoc arbitrations, whereby one party, usually the respondent, in an attempt to avoid arbitration refused to acknowledge receipt or to take delivery of communications from the arbitral tribunal. Paragraph 32 might accordingly mention that in certain situations, after the other party had received the request for arbitration and whether or not it had appointed an arbitrator, it would be possible for the applicant's arbitrator to give notice at the outset that writings would be sent directly by the arbitral tribunal and be treated as received regardless of whether there was confirmation of receipt or not, except in the event of a change of address.

15. **Mr. HOLTZMANN** (United States of America) agreed the section should be redrafted, as it covered only documents exchanged between the parties. It should be expanded to include communications between a party and the arbitral tribunal and vice versa. The redrafted text should also make it clear that the examples given in paragraph 32 were not the only possibilities.

16. **Mr. OLIVENCIA** (Spain) agreed with the previous speaker. The present text did not exhaust all the possibilities, or even deal with those possibilities which occurred most frequently, but it should do so. The most frequently occurring possibilities were not those in which the parties directly exchanged their writings and sent copies to the arbitrators; rather, it was more usual for the copies to be sent to the arbitral tribunal, and for the original to be submitted to the tribunal as well. That did not exclude the possibility that copies could be exchanged directly between the parties, or that the appropriate number of copies could be submitted to the tribunal for transmittal to all the parties. What was important was to establish the means of communication, the persons responsible for making any communications from the tribunal to the parties, and the recipients of such communications and their addresses.

17. **Mr. MELIS** (Observer for the International Council for Commercial Arbitration) agreed it should be made very clear that the examples in the text were only examples and that there were other possibilities. In addition, the second part of the first sentence was not strong enough; it was essential for all arbitral tribunals to make it clear from the very start of the proceedings how documents and writings would be routed.

18. **Mr. SEKOLEC** (Secretariat) asked whether the Commission wished the Notes to deal with the situations described by the representative of Poland, where parties attempted to use dilatory tactics or were passive. If so, he wondered if a general reference should be included and whether, in terms of what to do in such situations, the Notes should follow approximately the wording of article 2, paragraph (1) of the UNCITRAL Arbitration Rules.

19. **Mr. HOLTZMANN** (United States of America) said that his delegation might welcome wording along the lines suggested by the representative of Poland. He agreed with the Secretariat that the appropriate approach was to follow the spirit, if not necessarily the exact wording, of article 2 (1) in the UNCITRAL Rules.

20. **Mr. MELIS** (Observer for the International Council for Commercial Arbitration) said that the problem raised by the representative of Poland was a real one, but that he would prefer to leave the text as it stood, because to add anything might open up endless further possibilities of amendment.

21. **Mr. FOUCHARD** (France) agreed with the previous speaker. The Commission was not at present establishing arbitration rules and would face even greater difficulties if it began drafting formulations of the kind contained in the UNCITRAL Rules. It was not the purpose of the Notes to provide solutions, but simply to draw attention to the problems posed by systematic refusal to receive writings.

22. **Mr. SEKOLEC** (Secretariat) said that, in that case, the Secretariat would simply draft a remark to the effect that arbitrators should be careful to keep all return slips for international postal receipts.

23. **Ms. ZHANG Yuejiao** (China) said that the first sentence of paragraph 32 should be rewritten to state that, in general practice, parties transmitted copies to the arbitral tribunal, which forwarded them as appropriate, but that in certain cases it was also possible for the parties to exchange writings directly. The Commission should avoid wording which suggested that a party could refuse to accept a communication. It should also be emphasized that, whereas pre-established procedures existed for handling writings in administrative tribunals, major problems arose when it came to ad hoc arbitration procedures.

Section 8

24. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that the last sentence of paragraph 34 should be deleted, as it might be inconsistent with the draft Model Law on Electronic Data Interchange (A/CN.9/406), article 5 of which gave a data message the same value as a writing, and article 8 of which granted the admissibility and evidential value of data messages. As electronic communications were the field of the future, the sentence was superfluous.

25. **Mr. BURMAN** (United States of America) said that his delegation's comments on paragraph 29 applied equally to paragraph 33, as they were based in part on the developing interrelationship of computerized means of communication, in which telefax was being used increasingly simply as a receipt and printing mechanism for computer transmissions.

26. **Mr. LEBEDEV** (Russian Federation) said that, as his delegation understood them, paragraphs 34 and 35 concerned only those cases where the parties had agreed that documents would be provided not in paper-based form but through electronic means. It was only when there was such an agreement that any question would arise as to the use of such methods and that, regardless of whatever agreement there might be between the parties, the arbitral tribunal might recognize that documents must none the less be provided in paper-based form. No provision was being made for the arbitral institution to take an initiative whereby documents would have to be provided not in paper-based form but by electronic means. The use of such means depended on the technical capabilities of both the parties and the arbitrators in different countries.

27. **Mr. GRIFFITH** (Australia) said that paragraph 33 seemed somewhat old-fashioned and discouraging, as telefax was now an accepted part of life. Rather, language might be used to the effect that "it may be considered whether confirmation of some telefax documents should be required".

28. **Mr. ABASCAL ZAMORA** (Mexico) said that, with regard to paragraphs 34 and 36, time differences should be taken into account when electronic means were used. For example, when there was a time-limit for submitting a writing, the calendar day might be different for sender and recipient. Or, where both parties were required to submit writings at the same time, a party in an earlier time zone would have to send its writing earlier, and the party in the later time zone would have the advantage of being able to study it before submitting its own. Consideration should also be given to the need for acknowledgments of receipt for electronic communications. That was a very common practice, but it had to be established what the effect was of an acknowledgment or lack of acknowledgment. For example, in cases where a writing had not been received or there was no acknowledgment of receipt by one party, it was necessary to know whether to send another electronic communication or to send the document in writing.

29. **Mr. BONELL** (Italy) agreed that paragraph 33 was somewhat old-fashioned and perhaps rather exaggerated in stressing the possible shortcomings of communication via telefax. He had some concerns about the last sentence. It was reasonable to envisage that the parties and/or the arbitrator might "decide that certain types of documents should not be sent by telefax". But it hardly then seemed appropriate to suggest that the arbitral tribunal might nevertheless retain discretion to treat a document so sent as received, or even not to inform the other party.

30. Clearer language would also be advisable in paragraph 35. If the arbitral tribunal was not technically equipped for electronic communication, it would be unable to receive documents in that form, and therefore an agreement between the parties to adopt that means would no longer be relevant.

31. **Mr. SEKOLEC** (Secretariat), explaining the intention of paragraphs 34 and 35, said that, in order to facilitate the practical arrangements, parties often wished to exchange certain types of documents in electronic form, sometimes in addition to paper, sometimes not. Some arbitrators might also wish to have copies of electronic messages. The scope of the paragraphs was much more limited than it might appear, namely, to facilitate the typing of such messages, which might not be as easy to do with the paper-based form.

32. **Mr. LEBEDEV** (Russian Federation) said that paragraph 34 seemed to concern an agreement between the parties as to the use of electronic means only for communication between themselves, and not in the context of the arbitration. If so, they hardly needed guidance from the Notes. If, however, the paragraph concerned an exchange of documents between the parties in the context of the arbitration, the problem of ensuring that the tribunal received copies would arise.

33. **Mr. MELIS** (Observer for the International Council for Commercial Arbitration) said that, like previous speakers, he was not happy with the wording of paragraph 33. Telefax had become a fact of life in international arbitration. There was no problem with a mutilated communication, because in such a case the parties or arbitrators receiving the communication would ask for a new one. Accordingly, he would favour reversing the order of the text, giving the priority to telefax and then perhaps allowing the arbitrators or parties to establish which other communications should be sent in paper-based form, to avoid being flooded with the double forms of communication via telefax and hard copy.

34. As to the point raised by the representative of Italy on paragraph 35, it was perhaps a matter of language. There might be an agreement between the parties, on the one hand, and then a different decision by the arbitrators, on the other. But the essential problem was that there might be a technology gap between the tribunal and the parties which would have to be bridged.

35. **Ms. ZHANG Yuejiao** (China) said that, in paragraph 33, the phrase "should not be sent by telefax" should be rewritten. When confidentiality was an issue in the sending of telefaxes, the parties concerned should take measures to ensure such confidentiality, either by not using telefax or by encrypting their messages; that did not mean, however, that their confidentiality would not be maintained by using telefax.

36. Paragraph 35 should emphasize the fact that an arbitral tribunal could receive documents both through electronic means and in paper-based form. If it could accept both, it should establish which was the controlling one. In paragraph 36, concerning the procedures to be followed when a message was lost or the communication system otherwise failed, language should be added to the effect that parties and tribunals should reach agreement with the other parties, when adopting such measures, as perhaps the costs of arbitration would be increased.

37. **Mr. BURMAN** (United States of America) said that it might be better to condense paragraphs 34-36 into a couple of sentences and not focus on the detail of the methods of communication, as those methods were not an integral part of arbitration and were not especially necessary in a document dealing with issues involving international commercial arbitration.

Section 9

38. **Mr. HOLTZMANN** (United States of America), referring to the title of the section, said that parties wanted to know if one or more exchanges of documents would be permitted. In his view, a more general title such as "Arrangements for written submissions" might be preferable. In regard to the third sentence of paragraph 37, the present formulation seemed to be weighted against the idea of organizing procedures. The sentence should be redrafted to reflect the fact that while some tribunals might prefer to leave the extent and timing of the various exchanges to be decided in the light of developments, others might wish, at an early stage in the proceedings, to determine the number of exchanges of written submissions permitted and then to schedule the first exchange.

39. **Mr. SZURSKI** (Poland) expressed his agreement with the representative of the United States, but felt that the term "exchange" would be more objective than "arrangements".

40. **Mr. HOLTZMANN** (United States of America) said that the word "exchange" was not entirely satisfactory, since the submissions concerned were not always exchanges. In some cases, the tribunal might ask one party to make a written submission in order to explain a particular point.

41. **Mr. FOUCHARD** (France) said that the title should simply be "Written communications", which would cover every case. On other points he agreed with the representative of the United States, though the latter's suggestion was somewhat novel and designed to satisfy countries in which the exchange of writings was essential. Though he had some misgivings, he could accept the formulation.

42. **Mr. OLIVENCIA** (Spain) said that the word "timing" in the title of section 9 underlined the great importance of the chronological factor. It was not just a question of dates, but of phases in the procedure: the section was concerned not just with the exchange of writings, but also with the time when that exchange took place. The claims, allegations and evidence referred to in paragraph 37, for example, were phases or sequences of acts in the procedure. He could go along with changing the word "timing" on condition that the concept of time and of distinct phases in the procedure was retained.

43. **Mr. HOLTZMANN** (United States of America) pointed out that the paragraphs on written submissions included nothing about post-hearing submissions. The parties themselves might have different expectations as to whether such post-hearing submissions would be permitted or not and might come from countries with very different practices in the matter. He therefore suggested the inclusion of a paragraph 39*bis* that would point out the existence of such differences in expectations and practices and draw attention to how useful it might be for arbitral tribunals to ask the various parties whether they expected post-hearing submissions to be allowed. In some cases, the desirability of post-hearing submissions would not be known until a later stage in the proceedings. Consequently, an early decision on the subject would not always be appropriate. Moreover, if such a decision were made at an early stage in the proceedings, it should be open to subsequent revision in the light of developments.

44. **Mr. ABASCAL ZAMORA** (Mexico) expressed his agreement with the representative of the United States regarding the insertion of a paragraph 39*bis*. It was quite common for the parties to have different expectations regarding the possibility of making submissions after the hearings had taken place.

45. **The CHAIRMAN** said that the Secretariat would include a provision along those lines.

Section 10

46. **Mr. GRIFFITH** (Australia) said that the title of section 10 appeared to suggest a change in style. In his view, it might be preferable to delete the words in brackets. As for the examples given, he suggested that they include a reference to the storage of documents.

47. **Mr. SEKOLEC** (Secretariat) said that titles would not normally be drafted in such detail, but that in the present case it had been thought that the title could serve as a useful check-list and give an indication of the kind of topics that arbitrators should bear in mind. The Secretariat would in any case review all titles after the present discussion by the Commission.

48. **Mr. GRIFFITH** (Australia) welcomed the idea of a review of the titles, which should be designed to make the check-list easier to use.

49. **Mr. FOUCHARD** (France) expressed his agreement with the representative of Australia. In his view, paragraph 40 was alarming in its excess of details. It could lead the arbitrator to oblige the parties to concern themselves with minor formalities that were irrelevant to their dispute, while overlooking the most important aspect, namely, respect for the equality principle and the right of defence. Forcing inexperienced arbitrators to impose such rules might lead to violations of the right of defence when a party, for material reasons, could not meet the requirements laid down. It might be useful to make such arrangements in some arbitrations, but, that did not in any way make them suitable for all.

50. **Mr. ABASCAL ZAMORA** (Mexico) said that paragraph 40 was too complex, too detailed and too regulatory. If it were retained, it should be simplified and couched in more general terms.

51. **Mr. MELIS** (Observer for the International Council for Commercial Arbitration) disagreed with the representative of Mexico, because arbitrators, especially non-professional ones, needed guidance. He was happy with paragraph 40 as it stood, since it dealt with a real problem, namely, that of finding a satisfactory way of organizing the documents. Indeed, he thought that the list of items could be expanded. For instance, arbitrators might need to decide the language or languages of submissions and, once the languages were agreed, whether annexes would be permitted in other languages. In regard to translations, it might be necessary to distinguish between documents requiring official translations and other documents where an ordinary translation would suffice.

52. **Mr. HOLTZMANN** (United States of America) agreed with the previous speaker. Such detailed advice would help the rights of the defence by making it easier for the arbitrator to find the documents concerned. Regarding the other complaint by the representative of France, he said he would have no objection to including the phrase "in some cases" after the words "it may be helpful" in the *chapeau* to paragraph 40 so as to make the text less comprehensive than it was at present. Concerning the observations on languages made by the previous speaker, he was under the impression that the subject had already been covered during the discussion of paragraphs 17 to 19.

53. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that paragraph 40 was by no means binding and that the suggestions it made might indeed be helpful. Some arbitrations involved a great many documents, which might be submitted at different moments in time. The organization of such materials could be beneficial to the arbitration proceedings. He therefore agreed with the observer for the International Council for Commercial Arbitration that the paragraph should be retained.

The meeting was suspended at 11.20 a.m. and resumed at 11.50 a.m.

Section 11

54. **Mr. ABASCAL ZAMORA** (Mexico) referred to paragraph 43, which mentioned the possibility that the tribunal might decide to make awards in a specific order. He would urge caution: arbitrators might be well advised not to commit themselves prematurely to rendering judgements in a specific order, since that might in the end complicate the procedure and take up too much time. It would be preferable for arbitrators to retain their freedom: it was one thing to say that they could render awards in a particular order and another to say that they should.

55. **Mr. FOUCHARD** (France) agreed with the representative of Mexico. It might be dangerous to establish the possibility of making partial awards and lay down an order in advance. It might also be dangerous to draw up a list of the points at issue in all cases. At the time when the list was drawn up, the parties might not always be aware of all aspects of the case and all possible developments. Such a list might prevent the arbitrator from dealing with additional subjects that arose in the course of the proceedings. That could create many difficulties, and a number of arbitral institutions had been reluctant to take that path. The terms of the dispute should not be frozen at the outset.

56. **Mr. HOLTZMANN** (United States of America) agreed with the representative of France that paragraph 41 could be usefully modified to make it clear that any list of the points at issue, whenever it was prepared, might be subject to revision as the case developed. He pointed out that the UNCITRAL Rules

(Mr. Holtzmann, United States of America)

required the points at issue to be stated at the earliest stage. However, there should be no attempt to exclude arbitration rules that might limit the possibility of changing the points at issue as the case proceeded. He was in favour of the French suggestion that paragraph 41 be made more flexible. It might be useful to state, at the end of the paragraph, that the terms of reference required under certain arbitration rules served the same purpose as the list suggested in paragraph 41.

57. **Mr. SZURSKI** (Poland) agreed with the previous three speakers. He drew attention to the third sentence of paragraph 43 and pointed out that the terms "partial" or "interim" could not be used to describe decisions, but only awards. Moreover, some legislations did not provide for the possibility of awards of such a nature.

58. **Mrs. GREINER** (Observer for Switzerland) said that although she would prefer to delete the whole of section 11, she realized that that might not have majority support. She therefore suggested that the section be redrafted in a more balanced form to take account of the points raised by the representatives of France, Mexico and Poland.

59. **The CHAIRMAN** requested the Secretariat to revise section 11 to take account of the comments made.

60. **Mr. HOLTZMANN** (United States of America) said that he hoped that in redrafting section 11 the Secretariat would also consider giving in flexible terms a definition of the relief or remedy sought by the parties. Under article 18 of the UNCITRAL Arbitration Rules, that definition had to be included in the statement of claim, and such a definition had in fact been included in the previous version of the text under discussion without objection.

61. **Mr. SEKOLEC** (Secretariat) confirmed that the earlier version had indeed included a paragraph to the effect that there existed different practices as to the level of detail of the relief or remedy sought by parties. However, the Secretariat had felt that that touched upon the substance of the matters in dispute and thus went beyond the organizational matters with which the draft Notes were concerned. It had therefore deleted the paragraph, but could of course prepare a draft text for the next review of the Notes by the Commission the following year.

Section 12

62. **The CHAIRMAN** noted that there were no comments on section 12.

Section 13

63. **Mr. LEBEDEV** (Russian Federation) suggested that in paragraph 45 it might be useful to indicate, in accordance with article 27 of the Model Law on Arbitration, that the arbitrators could at that stage clarify the intention of the parties to request assistance from a court in taking evidence. That might well be inferred from the present drafting, but it should be spelt out.

64. *Moreover, in paragraph 47 some redrafting might be needed, at least in the Russian version, to make* it clear that the absence of a protest was not proof of a document having been received.

65. **Mr. ABASCAL ZAMORA** (Mexico) suggested that paragraph 49 should contain a reference to the various electronic means of transmitting documents listed in paragraph 36.

66. Paragraph 50 referred to the possibility of one party having to transmit certain documents to the other, reflecting the practice of "discovery" used in common law countries. Mention should also be made of the analogous but different practices used in other legal systems whereby on-the-spot inspections of documents within the control of one party could be made.

67. **Mr. FOUCHARD** (France) congratulated the Secretariat for having streamlined the text, but considered that even more could be done in that direction. Paragraphs 45 and 46 were very useful, but practically all of the rest of the section might be deleted. Paragraphs 47 to 49 gave over-detailed and not particularly useful advice, and paragraphs 50 to 54 were downright dangerous. He agreed with the Mexican representative that those paragraphs introduced into the arbitration procedure a watered-down version of the common-law procedure of "discovery", little used in civil law countries. It was not for UNCITRAL to recommend one evidential system rather than another — a system moreover which the United States and the United Kingdom delegations were not trying to impose in international arbitration because of the difficulties and expense involved. True, the system was optional, but it was very complex. Moreover, paragraph 51 was worded in such an abstract manner as to be incomprehensible. He therefore suggested that only paragraphs 45 and 46 and the last sentence of paragraph 54 should be retained.

68. **Mr. OLIVENCIA** (Spain) agreed with the views on the "discovery" system expressed by the representatives of France and Mexico. Since the Notes referred to peremptory norms of arbitral law procedures, they might have the force of public policy for parties to arbitration. The issue must therefore be dealt with very sensitively: any ambiguity in the text might introduce a practice completely foreign to certain legal systems, thus affecting the arbitration procedure itself.

69. **Mr. SZURSKI** (Poland) endorsed the views of the French representative.

70. **Mr. HOLTZMANN** (United States of America) said that paragraphs 50 to 54 did not reflect the common-law system with regard to documentary evidence and would read quite differently if they did. The Secretariat should be congratulated on producing a carefully-worded text.

71. In his view, paragraphs 45 to 49 were useful. He could probably accept the drafting amendments to paragraph 47 suggested by the representative of the Russian Federation. He would also prefer to retain paragraphs 50 to 53 in the Secretariat's more complete formulation, but could accept a shorter definition on the lines of article 24 (3) of the UNCITRAL Arbitration Rules and paragraph 54 of the present draft.

72. With regard to the issue of the powers of an arbitral tribunal to order a party to disclose an internal document, the UNCITRAL Arbitration Rules provided for such powers and there was no limitation on the kind of evidence an arbitral tribunal might request. However, since the wording of the last phrase of paragraph 52 might imply that the arbitral tribunal did not have such powers, it should be redrafted if the paragraph was to be retained.

The meeting rose at 12.35 p.m.